IN THE
SUPREME COURT OF MISSOURI

DUPLICATE OF FILING ON MAY 21 2004 IN OFFICE OF CLERK, SUPREME COURT

STATE OF MISSOURI ex rel. JEREMIAH W. (JAY) NIXON, Attorney General,	)	
Relator,	)	No. 086013
vs.	)	
HONORABLE MATT BLUNT, Secretary of State for the State of Missouri	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF SUPPLEMENTAL PETITION FOR WRIT OF MANDAMUS

Relator, the Attorney General, pursuant to this Court's order of May 25, 2004, offers the following suggestions in support of his Supplemental Petition for Writ of Mandamus.

Statement of Facts

The Secretary has a clear and present duty to take every action within the powers of his office to effect the August 3, 2004, special election on the constitutional amendment proposed in Senate Joint Resolution 29 (hereinafter, "SJR 29"). The Governor, pursuant to his constitutional authority under Article XII, Section 2(b), issued a May 19 Proclamation (*see* Exhibit E, p.114) calling this special election. The Secretary of State, pursuant to his oath to support the Missouri Constitution, *see* Mo. Const. Art.

VII, § 11 and Section 28.020[1], has (and has had since May 19) a clear and present duty to see that this election is held. Instead, he has done (and continues to do) everything he can to frustrate the Governor's constitutional prerogative to call this special election.

The Secretary first defended his actions by claiming that his hands were tied (*see* Exhibt F, p.115-16); that he could do nothing to effect the Governor's proclamation until the Speaker of the House and the President Pro-Tem of the Senate had taken steps neither contemplated nor required by the Constitution nor any statute. Events of Friday, May 28, however, have deprived the Secretary of this excuse.

On Friday, May 28, at approximately 3:00 p.m., a copy of the Truly Agreed and Finally Passed SJR 29, signed by the presiding officers of the House and Senate, was delivered to the Secretary. *See* Exhibit N (p.132). No longer can he hide behind the inaction of others. Now, any further delay in effecting the special election on SJR 29 rests on his shoulders, and his alone.

Within an hour of her receiving from Secretary Blunt a copy of SJR 29, the State Auditor delivered to the Secretary the fiscal note and fiscal note summary, approved by the Attorney General, required by Section 116.170 and Section 116.175 (Cumm. Supp. 2003). *See* Exhibit P (pp.135-43). Despite the Secretary's counsel's representation to the Circuit Court on May 20 that the Secretary's duties could be fulfilled in a matter of "hours," and despite the Secretary having fulfilled his duties in mere minutes in 2002 in

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[1] All statutory reference are to RSMo 2000 unless otherwise noted.

order to facilitate putting a $500 million tax increase on the August 2002 ballot, the Secretary has transmitted to the Attorney General neither the "fair ballot statement" nor the "summary statement" required by Section 116.025 (Cumm. Supp. 2003) or Section 116.160, respectively. Even though the Attorney General arranged with the Secretary to accept delivery of these items after business hours or over the holiday weekend, (*see* Exhibit M, p.129), the Secretary has chosen to pile delay upon delay. In other circumstances, perhaps, the Secretary may have the authority to delay under one or more statutes, but this authority cannot be used to strip the Governor of his constitutional power to send the constitutional amendment proposed in SJR 29 to a vote of the people at a special election on August 3, 2004.

1. The Secretary Cannot Be Permitted to Frustrate the Governor's Constitutional Prerogative to Call a Special Election.

Article XII, Section 2(b) of the Missouri Constitution gives the Governor the authority to call a special election to consider proposed constitutional amendments.:

> All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments.

This provision is mandatory: "All amendments proposed by the general assembly . . . shall be submitted to the electors . . .at the next general election, or at a special election called by the governor prior thereto[.]" [Emphasis added].[2] The Constitution does not give the Secretary, or any other state officer, the right to overrule the Governor's decision to call a special election. The Secretary's position, however, is that by manipulating the statutory procedures and deadlines, and by insisting on procedures neither required in nor contemplated by any statutory or constitutional provision, he alone can decide whether the Governor's Proclamation is to have any effect.[3] One state officer, however, cannot usurp powers constitutionally dedicated to a different state officer. *Ashcroft v. Blunt*, 813 S.W.2d 849, 854 (Mo. banc 1991).

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[2] The only constitutional limit on the Governor's power to call a special election is that he must do so in time to permit the publication of the proposed amendment called for in Article XII, Section 2(b), *i.e.*, that publication occur in two consecutive weeks, with the "last publication to be not more than thirty nor less than fifteen days next preceding the election."

[3] The Secretary makes much of the phrase "as may be provided by law" in Article XII, Section 2(b), arguing that this incorporates the statutes in Chapters 115 and 116 into the Constitution. The Attorney General does not contest that these statutes apply. But, the issue in this case is whether those statutes limit or revoke the Governor's constitutional prerogative to call a special election under Article XII, Section 2(b), and whether those statutes can be manipulated by the Secretary or others to achieve the same end.

2. The Secretary's Duty to Effect the Governor's Call for a Special Election Arose on May 19; a Duty He Has So Far Shirked.

The Governor's May 19 Proclamation (Exhibit E, p.114) called a special election for August 3, 2004, for the purpose of having the people vote on the constitutional amendment proposed by the General Assembly in SJR 29. From that moment, the Secretary had a duty to do everything within the power of his office to effect that Proclamation. This is the meaning of the oath he swore to "support" the Constitution of this state.

A. SJR 29 Was Adopted By the General Assembly on May 14.

Instead of performing the tasks assigned to him by law, the Secretary raised a number of excuses. First, he claimed that the General Assembly had not "adopted" SJR 29 and thus he could take no action upon it. The Secretary argued that the General Assembly had not "adopted" SJR 29 because neither the Speaker nor the President Pro-Tem had (at that time) signed it. But Article XII, Section 2(a), alone declares what is necessary for the general assembly to "adopt" a proposed constitutional amendment. It provides that "[c]onsitutional amendments may be proposed at any time by a majority of the members-elect of each house of the general assembly, the vote to be taken by yeas and nays and entered on the journal." The Secretary cannot insist upon "adoption" requirements of his own invention, in addition to those imposed by Article XII, Section 2(a).

The Secretary argued that Article III, Section 30, requires the signature of both presiding officers. True, Article III, Section 30, requires the signatures of the presiding officers, but only for "bills" that are to "become a law." SJR 29 is neither a bill, nor is it to become a law absent an affirmative vote of the electors. Though resolutions that are to have the force and effect of law must follow bill passage requirements. *see Weinstock v. Holden*, 995 S.W.2d 411, 416-17, such is not true for all resolutions.[4] Indeed, Article IV, Section 8, unmistakably provides that joint resolutions proposing constitutional amendments need not follow such procedures.

The ramifications of the Secretary's argument that the presiding officers of the House and Senate must sign a proposed constitution before it can be sent to the voters are dire. First, in every even-numbered year, the Governor's constitutional prerogative to call a special election would always be subject to the whim of either presiding officer, who could withhold his or her signature until the constitutional deadline for the General Assembly adjournment, which is now after the 10-week ballot certification deadline for

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[4] Even in the case of a bill proposing a statute by referendum, where the signatures of the Speaker and President Pro-Tem would seem to be required by Article III, Section 30, this Court has held that this requirement is merely "directory," and the lack of signatures was immaterial to the people's right to decide matters put to their vote. *Brown v. Morris*, 290 S.W.2d 160, 168 (Mo. banc 1956).

the August election date provided in such years by Section 115.121.2 (Cumm. Supp. 2003).

Even worse, by demanding their signature before proceeding, the Secretary cedes to either the Speaker or President a right to veto – by withholding their signature – a proposed constitutional amendment, thus keeping it from being voted upon at any election, special or general. Neither this Court nor the Constitution would permit such an attempt by either presiding officer to usurp the authority of the majority of both houses to propose, and the electors to approve, constitutional amendments.[5] Nor will the Constitution permit the Secretary's attempt to insist on such a lawless procedure to his own ends in this case.

Article XII, Section 2(a) is like that wall in the great old spiritual: the Secretary cannot go over it, he cannot go under it, and he cannot go around it. It alone establishes the acts of the general assembly necessary to propose a constitutional amendment. Those acts were performed on March 1 (Senate passes SJR 29 by vote of 26 yeas and 6 nays, *see* Exhibit B, p.12) and on May 14 (House passes SJR 29, without amendment, by vote of 130 yeas and 26 nays, *see* Exhibit C, pp.100-01). On May 14 – not one day later – the

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[5] *See Brown*, 290 S.W.2d at 167 (rejecting the argument that the presiding officers' signatures were a pre-requisite to a statutory referendum, noting that otherwise either officer could "veto" the provision, which not even the Governor can do, and the General Assembly would be powerless to override such a "veto").

General Assembly had adopted SJR 29 and on May 14 – not one day later – SJR 29 was bound for the November general election or "a special election called by the Governor prior thereto[.]" Article XII, Section 2(b).

The Governor's May 19 Proclamation was authorized by Article XII, Section 2(b), and the Secretary's receipt of that Proclamation on May 19 triggered a duty to do everything within the power of his office to effect the special election called for therein. Specifically, but without limitation, his receipt of the Governor's Proclamation reciting SJR 29 triggered his duty to comply with Section 116.025 (Cumm. Supp. 2003) by preparing "fair ballot language statements" for posting at polling places, and delivering these statements to the Attorney General for his review. The Secretary's receipt of the Governor's Proclamation also triggered his duty to comply with Section 116.160 by preparing a ballot summary for the proposed constitutional amendment, and delivering this summary to the Attorney General for his review. This summary, and the fiscal note summary prepared by the Auditor and approved by the Attorney General, become the official ballot title. The Secretary further had a duty to certify this ballot title pursuant to Section 116.180, and to prepare sample ballots including the ballot title for SJR 29 pursuant to Section 116.230. Then, he was to send this sample ballot and a notice of the special election concerning SJR 29 to local election authorities on or before May 25, 2004. He failed in all of these duties and chose, instead, to engage in further evasion.

B. The Secretary Received SJR 29 On May 19 and Numerous Times Thereafter.

Rather than complying with his duty to effect the special election called for in the Governor's May 19 Proclamation and play his role in the statutory process described above, the Secretary refused to act – claiming that he had not "received" SJR 29. True, the statutes provide that the Secretary's actions are to occur "after receipt of such resolution," Section 116.160, or after "receiving a statewide ballot measure," Section 116.025 (Cumm. Supp. 2003), but the statutes do not say from whom the Secretary must receive the resolution,[6] nor in what form. Indeed, as discussed below, the statutory references to "receipt" or "receiving" only provide a point in time from which the 20-day deadline is to run. These statutes do not prohibit the Secretary from performing his duties in anticipation of "receipt" or "receiving" the resolution once the House and Senate Journals show it to have been adopted -- especially when it is necessary or advisable for him to do so in order to fulfill his higher duty to ensure that a governor's proclamation for special election is effectuated.

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[6] When the General Assembly, in the context of ballot title preparation, intends to limit from whom a document must be received before a duty commences, it has explicitly so stated. *Compare* Section 116.160 (containing no requirement from whom the resolution must be received) *with* Section 116.175.1 (Cumm. Supp. 2003) (providing that "upon receipt from the secretary of state's office" the State Auditor's duties shall commence).

The Secretary's claim that he was not in "receipt" of SJR 29 prior to May 28 cannot survive scrutiny. On May 19, the Secretary received the Governor's Proclamation, which recited the text of the proposed constitutional amendment in SJR 29 (omitting the concluding period). On May 20, the Secretary further received a copy of the Truly Agreed and Finally Passed SJR 29 – in precisely the same form, to the last jot and tittle, as the version that was signed and delivered to him on May 28 – attached as an exhibit to the Attorney General's Circuit Court pleadings. Finally, on May 21, the Secretary received a copy of the Truly Agreed and Finally Passed SJR 29, certified and authenticated by the Secretary of the Senate as "true and accurate" – in precisely the same form, to the last jot and tittle, as the version signed and delivered on May 28 – attached as an exhibit to the Attorney General's Court of Appeals pleadings. Surely these multiple receipts were sufficient for the Secretary to prepare a ballot summary, if he were so inclined – and the Secretary's inclination should never be the determining factor as to whether a Governor's constitutionally authorized proclamation for a special election is to be given effect.

Each document the Secretary received – the Governor's May 19 Proclamation, the May 20 copy of the TAFP SJR 29, and the May 21 certified copy of the TAFP SJR 29 – was sufficient for the Secretary to perform his duties under Section 116.025 (Cumm. Supp. 2003) and Section 116.160. The Secretary's duties under these statutes require only that he fairly summarize the proposed constitutional amendment. Thus, an

immaterial or typographical variance between any of the copies of the resolution given the Secretary and the text of the proposal actually passed by the General Assembly on May 14[7] would not interfere with his duty to summarize the proposal. Moreover, at all times following May 14, the Secretary had access to – and a duty to consult – the only authoritative source for determining what the General Assembly had passed . . . the Journals. The Secretary is never permitted to rely on others – even the signatures of the presiding officers of the House and Senate – to ensure correctness. *See Ashcroft v. Blunt*, 696 S.W.2d 329, 331 (Mo. banc 1985) (Secretary of State had no authority to publish as law a bill which the Journals proved varied from the text actually passed, notwithstanding that the presiding officers of the House and Senate had signed the inaccurate bill as true and accurate).

As the Secretary's counsel recounted to the Circuit Court, the events of late May 2002 are illuminating regarding how quickly the Secretary can proceed in putting a measure before the people in a special election – at least when he wants to. There, the Secretary had no qualms – constitutional or otherwise – about preparing his ballot

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[7] The Governor's Proclamation omitted the period at the end of twenty-word proposed amendment. The copy signed by the Speaker and the President Pro-Tem on May 28, however, is in precisely the same form as that delivered to the Secretary on May 20 and May 21, and each of these accurately reflects the language adopted by the Senate on March 1 and the House on May 14.

summary in advance of the presiding officers' signatures.[8] In facilitating the complex $500 million tax proposal, the Secretary apparently had no trouble discerning the language that had been passed — presumably from the Journals — and drafting his ballot summary before receiving the final, signed version. The Secretary even sought "pre-approval" from the Attorney General so that, when the bill was signed by the presiding officers, the Secretary was sure that things would proceed quickly. His preparation and cooperation paid off; the entire ballot title was prepared, approved, certified, and incorporated into the sample ballot in less than one hour, and the certification and distribution by facsimile to every local election authority took just an additional 69 minutes, with more than an hour to spare before the 10-week deadline. *See* Exhibit L (pp.127-28).

Returning to the facts of the present case, on May 19 the Secretary had everything he needed to perform his statutory duties under Sections 116.025 (Cumm. Supp. 2003) and 116.160, and other applicable statutes, and his duty to perform those tasks arose not just from "receipt" of the SJR 29 but, more important, from his obligation to effect the Governor's May 19 Proclamation.

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[8] Because the issue in 2002 was a proposed statute being put to a vote by referendum, Article III, Section 30, applied and the presiding officers' signatures were nominally required. *But see Brown*, 290 S.W.2d at 168 (presiding officers' signatures not even required in cases of statutory referenda).

C. The Secretary's Excuses Evaporated On May 28.

The Secretary first blamed his failure to act to effect the Governor's May 19 Proclamation on the Speaker and the President Pro-Tem's failure to take an action that is not required by the Constitution or by statute. Next, the Secretary claimed he could not act to effect the Governor's Proclamation because he had not "received" SJR 29 and thus had no way of knowing what the General Assembly had passed, notwithstanding his ready access to the Journals. Both of these excuses evaporated on May 28, when the Secretary of the Senate delivered to the Secretary of State a copy of SJR 29, signed by the presiding officers of the House and Senate. *See* Exhibit N, p.132.

On May 28, after receiving the signed copy of SJR 29, the Secretary delivered a copy of SJR 29 to the Auditor. *See* Exhibit O (pp.133-34). The Auditor then completed her duties with respect to the ballot title and returned the fiscal note and fiscal note summary to the Secretary within one hour. *See* Exhibit P (pp.135-43). To date, however, the Secretary has not delivered the "ballot summary" or the "fair ballot language" to the Attorney General as he is required to do by Section 116.160 and Section 116.025 (Cumm. Supp. 2003), respectively.

It is expected that the Secretary will attempt to excuse his failure to act – notwithstanding his counsel's representation to the Circuit Court that the Secretary's duties could be completed within "hours," and the Secretary's own actions just two years ago in which the Secretary completed in mere minutes everything necessary to place a tax

increase on the ballot by relying on the provisions of Section 116.025 (Cumm. Supp. 2003) and 116.160. These provisions, the Secretary will argue, give him twenty days to draft the "fair ballot language" and the "ballot summary." But, nothing in these statutes require him to take twenty days, they merely prohibit the Secretary from taking more than twenty days. Circumstances such as the desire to include a proposed $500 million tax increase on the August ballot in 2002 (see Exhibit L (pp.127-28)), or, more relevant to the present case, a constitutional imperative to effect the Governor's May 19 Proclamation -- can (and, in the present case, must) make the Secretary perform these duties more quickly.

However Herculean the task facing the Secretary, *i.e.*, preparing no more than a 50-word ballot summary of this 20-word proposed constitutional amendment, the Secretary had, beginning on May 19, a duty to complete the ballot title in time to meet the May 25 deadline for certification and distribution set forth in Section 116.240. The Secretary failed to do so. The Secretary's failure, however, cannot override the Governor's constitutional prerogative to put SJR 29 to a vote of the people on the August ballot.

3. The Secretary Cannot Use the Certification and Distribution Deadline in Section 116.240 To Frustrate the Governor's Call for a Special Election.

For each election at which a proposed constitution amendment is to be voted upon, Section 116.240 requires the Secretary to send to each local election authority, "[n]ot later than the tenth Tuesday prior to an election," a certified copy of the legal notice to be published and a copy of the sample ballot showing the ballot titles for each constitutional amendment being proposed. In this case, the Secretary failed to perform this duty. Although he sent such a notice, including a sample ballot, on May 25 – the tenth Tuesday before August 3 – he failed to include the proposed constitutional amendment in SJR 29 in the notice or on the sample ballot despite the Governor's May 19 Proclamation calling a special election on that date for that purpose.

It is expected that the Secretary will claim that he could not comply with his duty under Section 116.240 to provide an accurate notice and sample ballot for all of the reasons set forth above. As noted above, however, beginning not later than May 19, the Secretary had a duty to ensure that the ballot title was prepared in time to meet the Section 116.240 deadline, and the ability to do so. He cannot now use a default under Section 116.240, by whomever engineered, to frustrate the Governor's constitutional prerogative to put SJR 29 on the August 3, 2004, ballot.

The 10-week certification and distribution deadline in Section 116.240 is not required by the Constitution, and it is not sacrosanct. In fact, until 1997, Section 116.240 did not require certification and distribution until eight weeks prior to the election. *See* Section 116.240 RSMo 1996. It was extended, presumably, to ensure that litigation and other developments occurring after the initial certification and distribution could be completed, and their effects incorporated by supplemental or amending certifications and distributions, in plenty of time for the election authorities to have ballots printed and available for absentee voters by the sixth week before the election. *See* Section 115.281 (absentee ballots to be printed "not later than the sixth Tuesday prior to the election").[9] The statutes in Chapters 115 and 116 are replete with the General Assembly's acknowledgment that changes from the initial 10-week certification can, and in many circumstances, must be made.[10]

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[9] Section 115.281 even contemplates that supplemental or amending election notices may not arrive in time for the election authorities to comply with the six-week deadline, and so provides that, in any event, absentee ballots be printed "within fourteen days after candidate's names or questions are certified[.]" [Emphasis added].

[10] *See, e.g.*, § 115.121.5 (Cumm. Supp. 2003)(requiring only six weeks notice in August 2003); § 115.125.1 (Cumm. Supp. 2003) (creating exceptions to the 10-week deadline for certain parties or circumstances); § 115.125.2 (Cumm. Supp. 2003) (certain parties may call elections up to six weeks prior pursuant to court order); § 115.127.3 (Cumm.

Supp. 2003) (acknowledging that courts may remove candidates or issues after the initial ten-week deadline); § 115.127.6 (Cumm. Supp. 2003) (permitting candidate to remove his or her name from the ballot up to six weeks before the election); § 115.247.2 (permitting circuit courts to order changes to the ballot, regardless of the 10-week deadline, when errors are discovered thereon); § 115.333 (permitting courts to order new candidates or parties onto the ballot after the ten-week deadline as a result of litigation regarding initiative petitions); § 115.359.1 (permitting candidates to remove their names from the ballot, without regard to the ten-week deadline, after being named as a party candidate for a different office); § 115.359.2 (permitting candidates to remove their names from the ballot until the sixth week before an election upon court order); § 115.359.3 (permitting a candidate's name to be removed from the ballot by disqualification without regard to the ten-week deadline); § 115.361 (nominations to reopen if the incumbent or only candidate for nomination dies, withdraws or is disqualified on or before the eighth week prior to a primary election); § 115.363.1(1) (party committees may nominate until the fourth week before a primary election if all the party's candidates die after the last permissible day for filing); § 115.363.3 (party committees may nominate until the fourth week before the general election if the party candidate dies and until the sixth week before the election if the party candidate is disqualified); § 115.363.4 (party committees may nominate candidates for the general election if an unopposed candidate dies prior to the fourth week before the election or is

Two such acknowledgments are most relevant here. First, in Section 115.125.2 (Cumm. Supp. 2003), the General Assembly declares that "no court shall have the authority to order an individual or issue placed on the ballot less than six weeks before the date of the election," except as expressly authorized by statute allowing for changes even closer to the election. This declaration, whatever its force or effect on this Court's power to act during the last six weeks prior to an election, is an express acknowledgment by the General Assembly that courts may order new issues onto ballots after the initial 10-week certification but prior to the sixth week before the election.

Second, in the specific instance of proposed constitutional amendments, the General Assembly acknowledges in Section 116.190 (Cumm. Supp. 2003) that the Secretary of State must implement the result of litigation over ballot titles with new

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disqualified prior to the sixth week before the election); § 115.373 (names of candidates selected by party committees to fill vacancies created by death, disqualification or withdrawal to be filed with the Secretary of State or the proper election authority not later than four weeks prior to the election);§ 115.383 (requiring election authorities who are "duly notified" at any time to remove or add names to ballot before printing, or by use of pasters after printing); § 116.175.5 (Cumm. Supp. 2003) (court may require a redrafting of the fiscal note or fiscal note summary – to be included on the ballot – without regard to the 10-week deadline); § 116.185 (allowing identical or substantially identical ballot titles to be changed, without regard to the 10-week deadline as long as it is "before the ballot is printed").

certifications under Section 116.180, and with new certifications and distributions to election authorities under Section 116.240, even though the 10-week "deadline" has passed.

Accordingly, nothing in Chapters 115 or 116 prohibits the Secretary from correcting his incomplete, and thus inaccurate, certification and distribution made on May 25. Pursuant to this Court's May 25 order, the Secretary has already warned the local election authorities that this may – and, Relator urges, must happen.

4. The Secretary Cannot Claim that This Court Lacks the Power to Compel His Compliance With His Duty to Effect the Governor's May 19 Proclamation.

The "right to mandamus . . . [may be] invoked by any one aggrieved on account of a failure of the Secretary of State to perform his defined duties. This court has original jurisdiction by mandamus in the absence of legislative action to compel administrative officers to perform ministerial acts[.]" *State ex rel. Stokes v. Roach*, 190, S.W. 277, 278 (Mo. banc 1916). The Supreme Court has "repeatedly declared that [the Secretary of State] is purely a ministerial officer and as such may be compelled by mandamus to do what he ought to do." *Id.* (emphasis added).

It is expected, having engineered a default under the 10-week certification and notification deadline established under Section 116.240, that the Secretary will argue that no one – not even this Court – has the power to cause him to comply with the Governor's

Proclamation now that the 10-week deadline has passed. The Secretary might have found strong support for this claim in *Young v. Godfrey*, 966 S.W.2d 331, 332 (Mo. App. 1998), which held that courts could not issue writs affecting election ballots after the statutory deadlines for notification had passed. The *Young* case, however, is not good law.

The *Young* decision was expressly overruled by this Court just weeks ago. In *State ex rel. Brown v. Shaw*, 129 S.W.3d 372, 374 (Mo. banc 2004), this Court held that judicial relief, including by writ of mandamus, "is the only means to redress the [election authority's] refusal to place [a proper candidate's name] on the ballot." So it is with the present case. *See also Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996) (Secretary of State ordered to direct local election authorities to change ballot less than three weeks before election); *State ex rel. Bouchard v. Grady*, 86 S.W.3d 121, 123 (Mo. App. 2002) (rejecting as "absurd" the argument that the 10-week deadline prior to the general election can divest a court of jurisdiction over a primary election contest).

The Secretary of State's failure to include the constitutional amendment proposed by SJR 29 on the August ballot in his May 25 certification and distribution, despite the Governor's May 19 Proclamation that he do so, now can only be remedied by the writ of mandamus the Attorney General seeks.

As noted above, the inevitable effect of one of the Secretary's arguments is to reserve to the presiding officer of either the House or the Senate the absolute power to

veto a proposed constitutional amendment merely by withholding their signature. With the Secretary's current argument, he seeks to reserve for himself a similar veto power. If he can frustrate the Governor's May 19 Proclamation to put SJR 29 to a vote of people in August by refusing to take the steps necessary to include it in his certification and then claiming that no court can compel a remedy, he can also refuse to put SJR 29 – or any future proposed constitutional amendment -- on any ballot. If this Court cannot require him to make a supplemental or amending certification and distribution after the initial 10-week deadline, the Secretary need only ensure that subsequent certifications and distributions are made on the very last day, and then he can pick and choose which proposed constitutional amendments he wants to include.

For example, assuming that this Court sustains the Secretary's efforts to keep SJR 29 off the August ballot in this case, nothing would prevent the Secretary from refusing to put SJR 29 on the November ballot either – no one will know of his failure until the 10-week deadline has passed and, under this argument, no court could order a remedy. This Court simply cannot permit the unchecked usurpation of power necessarily implicit in the Secretary's argument. *See State ex rel. Drain v. Becker*, 240 S.W. 229, 235 (Mo. banc 1922) (Graves, J., concurring) ("Suppose the Secretary of State would refuse to put the referred bill . . . upon the ballot, and mandamus was brought to compel him to place the measure upon the ballot, could there be any question that this court would have to grant the writs!").

5. This Court's Writ Can Vindicate the Governor's Constitutional Prerogative to Call a Special Election Without Unduly Invading the Secretary's Conduct of His Office.

It is to be expected that the Secretary will claim that this Court, based on "separation of powers" or some other theory, cannot interfere with the conduct of his office. But the Attorney General is not, at this time, asking to the Court to instruct the Secretary how to write the "ballot summary" or "fair ballot language" for SJR 29, or even when he should do so other than within the timeframes established by Sections 116.025 (Cumm. Supp. 2003) or 116.160. Instead, the Attorney General is seeking a writ which merely instructs the Secretary that – when he is through accomplishing the tasks assigned to him by law – SJR 29 must be included on the August ballot and the Secretary must make a supplemental or amending notice to the election authorities to ensure it happens.

Accordingly, if the Secretary feels he needs twenty days to draft a 50-word summary of this 20-word proposal, he may take them. The writ the Attorney General seeks preserves to the Secretary the right to accomplish these task as he sees fit (within the law), but ensures that such delay cannot and will not affect whether SJR 29 is on the August ballot.[11] Thus, the only effect of the Secretary's additional delay will be on the

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[11] *See Stokes*, 190 S.W. at 279 (Supreme Court issued writ of mandamus against the Secretary of State where "a mandatory constitutional and statutory provision required him to do certain things in carrying out the will of the people preliminary to the submission of the

election authorities; limiting the time they will have to react to the supplemental and amending certification which this Court's writ will require the Secretary to make.

CONCLUSION and REMEDY SOUGHT

For the reasons set forth above, this Court must issue its Peremptory and Permanent Writs of Mandamus in order to vindicate the Governor's constitutional prerogative to have the constitutional amendment proposed by SJR 29 put the voters on the August ballot. Without this Court's writ, the inaction of the Secretary and others, combined with a deadline that the Secretary could have – but did not – meet, will conspire to render the Governor's May 19 Proclamation a nullity.

Accordingly, the Attorney General is seeking immediate Peremptory and Permanent Writs of Mandamus compelling the Secretary of State to take all actions within the power of his office to ensure that the constitutional amendment proposed by SJR 29 is put before the voters on August 3, 2004, as ordered by the Governor's May 19 Proclamation, and compelling the Secretary to complete all of his duties in this regard, and issue the supplemental and amending certification and distribution to the local

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proposed amendment").

election authorities to effect this Writ and the Governor's May 19 Proclamation, as soon as possible but in no event later than the sixth week prior to the August 3, 2004, election.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was served by hand delivery or U.S. Mail, postage prepaid, on this 31st day of May, 2004, and that a courtesy copy was sent electronically to:

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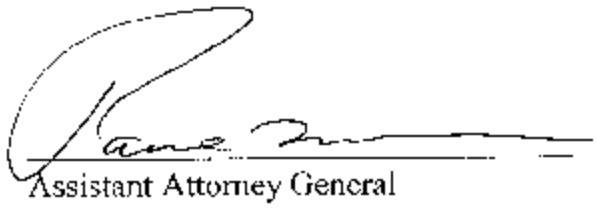

Assistant Attorney General